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REDEFINING ORIGINALITY IN COPYRIGHT LAW: NAVIGATING HUMAN AUTHORSHIP AND AI CHALLENGES

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Abstract

Originality lies at the heart of copyright law, forming the bedrock upon which protections are extended to creative works. But actually, defining and measuring originality has been an unending debate, not least regarding definition and changeability of interpretation across legal systems. This challenge is compounded further in the modern era by the role of artificial intelligence systems, whose results blur the boundaries between human and machine authorship. This paper will explore the concept of originality in its multifaceted complexity on multiple legal, philosophical, and practical dimensions. It addresses what constitutes originality, to what extent artificial intelligence-created works challenge or fundamentally transform existing copyright frameworks, and how the advancing technology shapes a new understanding of creative authorship. The study explores all these aspects and tries to aim for some clarification on the complexity of originality as evaluated through the copyright law and paths to addressing emerging issues.

Originality in Copyright Law: Definitional Challenges

¹The concept of originality is deceptively simple but hard to pin down. At the core, it demands that a work originate from the author and evidence some minimal level of creativity. What this "minimal creativity" entails, however, has been a point of much debate across jurisdictions. At various points in history, originality often was confused with effort or industriousness, as in the famous "sweat of the brow" doctrine. Under this approach, the labour and resources spent in producing a work were considered to be enough to make it original. Such an interpretation was adopted in early cases, especially those about collections of compiled factual data.

¹ Justin Hughes, Restating Copyright Law's Originality Requirement, 44 Columbia Journal of Law & the Arts 383 (2021) 9 (2021).

²The landmark U.S. Supreme Court case *Feist Publications v. Rural Telephone Service Co.*, from 1991, decisively rejected the doctrine of sweat-of-the-brow, holding that originality requires more than efforts but independence in creation and a "minimal degree of creativity." This case established a turning point since it settled that copyright law does not protect facts or raw data, no matter what labour is expended in gathering them. Instead, protection extends only to the unique selection or arrangement of these facts, provided such arrangement reflects a modicum of creative judgment. This ruling underscore a core principle: originality must involve intellectual effort rather than mechanical production.

³The *Feist* decision, although influential, left questions as to how the courts would measure originality in other contexts, where creativity may only be perceived as minimal or indistinct. There is an inherent subjectivity in the determination of what meets the definition of "original," which continues to cause inconsistencies in judicial interpretations, allowing for further refinement of the standard.

Historical Evolution of Originality in Copyright Law

Originality, as that term exists today, has evolved considerably over the course of centuries. Initially, the creative element was not a primary concern of copyright; the former served to control text reproduction and reward distribution. The Statute of Anne (1710), commonly recognized as the first copyright law in modern times, was purportedly an instrument of publishers with the goal of regulating the book trade and barely recognizing the rights of authors. The concept of protecting an author's intellectual labour eventually became popular, transforming the views of works as merely a product of effort to views of works as creative expressions of the mind.

During the 19th and early 20th centuries, courts began to confront the notion of originality more concretely. Early doctrines, such as the "sweat of the brow," made originality synonymous with industriousness, and provided rights for works that showed a great labour effort but little in terms of creativity. In due course, this interpretation gave way to courts that would establish intellectual effort and creativity as markers of originality. This historical

² Iliyasu Iliyasu Dauda, An Examination of the Copyright Originality Threshold, SSRN (Jan. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589345.

³ Gbenga Odugbemi, Re-Defining Copyright Originality Test, SSRN (July 31, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707794.

context spotlights the adaptability of copyright law, a trait likely to be critical as it faces challenges posed by AI-generated content.

Cultural Perspectives on Originality

⁴Originality, as a legal construct, is also, by virtue of the values established by the society, a cultural concept. Indeed, western legal systems place upon originality the marker of the lone, secluded genius, and singularity, emphasizing creativity and ownership by an individual. In contrast, many Eastern orientations understand the creative imagination as a collective, cumulative process, wherein works belong to a patrimony of community rather than the individual. The rise of AI further complicates these cultural narratives. AI-generated works often result from collaborative efforts involving programmers, data scientists, and end-users, challenging the Western focus on individual authorship. In a globalized world, where digital works transcend borders, these differing cultural perspectives on originality create friction in harmonizing copyright laws. In doing so, the cultural dimensions are explored, which further expands on the discussion of originality by illustrating different approaches to creativity and its possible rechannelling by AI.

International Perspectives on Originality

Originality is a worldwide condition for copyright protection, but its meaning varies from jurisdiction to jurisdiction. In the United States, for instance, the threshold for originality remains quite low and involves only independent creation and a relatively modest level of creativity. European copyright law tends to adopt a higher standard, especially under the "author's own intellectual creation" test codified by the European Union's Copyright Directive. This standard suggests a more significant relationship between the work and the author's unique intellectual decisions.⁵

In Canada and Australia, the approach to originality diverges as well. Canadian courts have adopted a hybrid model under the impetus of *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004), weighing both originality and effort. The model requires an element of skill and judgment. In contrast, Australian law sticks closer to the traditional "sweat of the brow"

⁴ James Koessler, Something for Nothing? The Standard of 'Originality' in Copyright Law, SSRN (Dec. 28, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707794.

⁵ Howard B Abrams, Originality and Creativity in Copyright Law, 55 *Law and Contemporary Problems* 14-35 (1992).

doctrine where industriousness sometimes assumes a more significant role in determining originality.

These differences point to the cultural and philosophical underpinnings of copyright law, shaping different value choices between encouraging creativity and accessibility to knowledge for the public. But in spite of these differences, a common challenge survives: how to apply these standards to modern forms of creativity that blur the lines between originality and derivation.⁶

Evolution and the Challenge of AI

The controversy about originality nowadays adds a new layer of complexity. More than human intervention, AI can create artwork, literature, music, and even software code. Typically, they are as good as created by humans. But then, as androgynous as these are, there lies the challenge of traditional notions of authorship and originality. Copyright law, historically rooted in human creativity, struggles to accommodate works generated by non-human entities. If originality requires intellectual effort, can a machine's output ever meet this criterion? Some jurisdictions, like the United States, explicitly exclude non-human creations from copyright protection, as demonstrated in cases like *Naruto v. Slater*, where the court denied copyright to a photograph taken by a monkey. The rationale is clear: copyright law is meant to reward human intellectual labor, not the acts of animals or machines. This approach, however, creates practical problems. Who shall enjoy the fruits when an AI-generated work becomes commercially valuable? Is it the programmer who developed the AI, the user who directed its use, or the entity that owns the AI system? Moreover, allowing copyright to AI works would create monopolistic control in creative industries, therefore impeding human authorship and innovation.

Ethical Frameworks for Originality Evaluation

Beyond considerations of law, the proliferation of AI-generated works forces questions regarding the ethical aspects of creativity and what copyright means to the aesthetic appreciation of creativity. For one thing, the extension of copyright to AI works could weaken the human-centric purpose of intellectual property law: it reduces the role of ingenuity in

⁶ Cheng-Lim Saw, *The Originality Debate in Copyright Law. The Canadian Perspective*, 63 *The Cambridge Law Journal*, 294-297 (2004).

advancing human ends. On the other hand, the exclusion of AI-generated works can stifle investment in AI technologies, suffocating the creations of new innovation. It raises very deep ethical questions about what creativity is or should be; what is copyright for?

Should originality be a quality that reflects human effort alone, or can it extend to external, non-human entities? It could diminish the human aspect of creativity if copyright were granted over AI outputs. Conversely, excluding AI-generated works from copyright might discourage investment in AI technologies - actually being a damper on any further innovation. Another key ethical issue is the use of copyrighted content in training AI models. Most AI systems are trained using datasets comprising copyrighted works, which are often used without permission. The doctrines of fair use might apply in some instances, but the obscurity that surrounds AI training processes makes it hard to enforce these and brings up questions about fairness and respect for rights of creators. Balancing competing interests, an ethical framework for originality in the AI era, would then focus on the differentiations of transparency, fairness, and an equitable diffusion of creative opportunities.⁷

Reconceptualizing Originality for the Digital Age

Since technology is in constant development, perhaps the idea of originality itself needs to be revisited and creatively refined. One way this could be done is by introducing a standard which is rather flexible to allow for work collaboration and hybrids in creativity. Thus, works involving human-AI collaboration could be evaluated not only as regards the human input put in, but also on the intent and intellectual effort which went into creating such a work, not the medium through which the same work was created. Another idea would be to create sui generis legislation for AI-generated works, independent of traditional copyright law. It may grant temporary rights on AI output at the expense of balancing the incentives of technological development with protecting the public domain.⁸

Policy Advocations

1. Reconsidering the Concept of Originality

The law must evolve with changing creative landscapes, especially when human-beings work with AI for the creation of works. Rather than identifying originality through the

⁷ Justin Hughes, Restating Copyright Law's Originality Requirement, 44 Columbia Journal of Law & the Arts 383 (2021) 9 (2021).

⁸ Iliyasu Iliyasu Dauda, An Examination of the Copyright Originality Threshold, SSRN (Jan. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589345.

medium or source, the focus would be on the effort of thought and intent infused in the making process. This change would enable works resulting from some meaningful human-AI interaction to be eligible for copyright protection and thus establish that human ingenuity is still central but with allowance made for the transformative potential of technology.⁹

2. **AI Training Transparency:** A major problem with AI-generated works is the lack of transparency in how these systems are trained. Most AI models rely on datasets of copyrighted materials used typically without permission. The sources of data training must be disclosed from AI systems, including copyright law compliance and respect for original creators' rights. Thus, clear guidelines on data usage would protect the existing works as well as instill trust and accountability in AI development.

3. **Sui Generis Rights to AI-Generated Works**

Against the challenges offered by content generated by AI, creating sui generis rights, a different kind of legal category specifically designed for AI-created works, will balance out this solution. Such a thing could offer limited protection, including a shorter period and less ease with transfer, to ensure AI outputs are recognized without undermining the original value of copyright law. This would stop the monopolistic control of creative industries while encouraging technological development.

4. **Global Harmonization of Copyright Standards**

International harmonization of copyright laws is crucial to provide clarity and consistency as AI works become de facto global works. Organizations such as the WIPO could undertake a leadership role in elaborating worldwide common standards as regards originality and AI-generated works. Uniform guidelines would reduce legal uncertainty and facilitate cross-border cooperation under fair and predictable rules, irrespective of where jurisdiction lies.¹⁰

5. **Public Domain Safeguards**

The public domain serves as a vital resource for creativity and innovation, and policies

⁹ Iliyasu Iliyasu Dauda, An Examination of the Copyright Originality Threshold, SSRN (Jan. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589345.

¹⁰ Howard B Abrams, Originality and Creativity in Copyright Law, 55 Law and Contemporary Problems 14-35 (1992).

should safeguard it against overreach by AI-generated works. Allowing AI to claim extensive rights on outputs derived from public domain materials could erode this shared resource, stifling human creativity. Policymakers must ensure that the public domain remains accessible and vibrant, protecting it from being monopolized by entities leveraging AI systems.

By managing these aspects, copyright law can evolve in response to the demands of the age and not compromise its commitment to fostering creativity, innovation, and equal access to knowledge.

Conclusion

Originality, after all, continues to be a cornerstone of copyright law; its application, however, has always been nuanced and context-specific. While the rejection of the sweat-of-the-brow doctrine helped establish its place, challenges such as AI-created works continue to evolve that standard of originality, more reflective of broader social shifts in the value and meaning of creativity. Given the growing importance of technology in mediating creative processes, it is high time to revisit the principles underlying originality to ensure they fit the bill. The task, no doubt complicated by the advent of AI, also brings a once-in-a-generation opportunity to rethink the relationship between authorship, creativity, and ownership in the digital age. By striking a balance between preserving the public domain and incentivizing innovation, copyright law can continue to serve its original purpose: to promote the progress of science and the useful arts.

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